



SCHENCK v. UNITED STATES (1919)

ORIGINS OF THE CASE Charles Schenck, an official of the U.S. Socialist Party, distributed leaflets that called the draft a “deed against humanity” and compared conscription to slavery, urging conscripts to “assert your rights.” Schenck was convicted of sedition and sentenced to prison, but he argued that the conviction, punishment, and even the law itself violated his right to free speech. The Supreme Court agreed to hear his appeal.

THE RULING A unanimous court upheld Schenck’s conviction, stating that under wartime conditions, the words in the leaflets were not protected by the right to free speech.

LEGAL REASONING

The Supreme Court’s opinion in the *Schenck* case, written by Justice Oliver Wendell Holmes, Jr., has become famous as a guide for how the First Amendment defines the right of free speech. Holmes wrote:

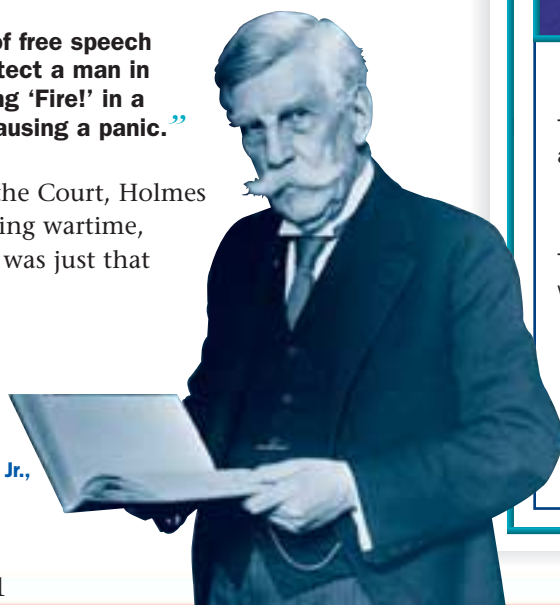
“The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent.”

Justice Holmes noted that “in ordinary times” the First Amendment might have protected Schenck, but “[w]hen a nation is at war many things that might be said in time of peace . . . will not be endured.”

The analogy that Holmes used to explain why Schenck could be punished for his words has become probably the best-known observation ever made about free speech:

“Protection of free speech would not protect a man in falsely shouting ‘Fire!’ in a theatre and causing a panic.”

Writing for the Court, Holmes implied that during wartime, Schenck’s leaflet was just that dangerous.



Oliver Wendell Holmes, Jr.,
Supreme Court Justice
1902-1932 ►

LEGAL SOURCES

LEGISLATION

U.S. CONSTITUTION, FIRST AMENDMENT (1791)

“Congress shall make no law . . . abridging the freedom of speech, or of the press.”

THE SEDITION ACT (1918)

“(W)hoever . . . shall willfully utter, print, write or publish any disloyal, profane, scurrilous, or abusive language about the form of government, . . . Constitution, . . . military or naval forces, . . . flag, . . . or the uniform of the Army or Navy of the United States . . . shall be punished by a fine of not more than \$10,000 or imprisonment for not more than twenty years, or both.”

RELATED CASES

DEBS v. UNITED STATES (MARCH, 1919)

The conviction against Eugene Debs for speaking against the war and the draft is upheld.

FROHWERK v. UNITED STATES (MARCH, 1919)

The publisher of a newspaper that had criticized the war is sentenced with a fine and ten years in prison.

ABRAMS v. UNITED STATES (NOV., 1919)

Leaflets criticizing the U.S. expeditionary force in Russia are found to be unprotected by the First Amendment. Holmes writes a dissenting opinion calling for the “free trade of ideas.”



WHY IT MATTERED

During the course of World War I, the federal government brought approximately 2,000 prosecutions for violations of the Espionage Act of 1917 or the Sedition Act of 1918, the same laws under which it convicted Schenck, Debs, and Frohwerk.

By the fall of 1919, however, Holmes had changed his mind. The case of *Abrams v. United States* concerned leaflets that criticized President Wilson's "capitalistic" government for sending troops to put down the Russian Revolution. Justice Holmes, joined by Justice Louis Brandeis, dissented from the majority of the Court, which upheld the conviction. In his dissent, Holmes emphasized the importance of a free exchange of ideas so that truth will win out in the intellectual marketplace. His reasoning won him acclaim as a protector of free speech.

The belief that truth will eventually win out in the marketplace of ideas has become important legal justification for promoting freedom of speech.



▲ Eugene Debs was arrested for antiwar speeches like the one he gave at this 1916 presidential campaign stop.

HISTORICAL IMPACT

Disagreements about what kinds of speech are "free" under the First Amendment continue. During the 1950s, when people were jailed for supporting Communism, and during the Vietnam War, when war protestors supported draft resistance, these issues again reached the Supreme Court.

The Court has also been asked to decide if young people in schools have the same First Amendment rights as adults. In *Tinker v. Des Moines School District* (1969), the Court ordered a school to readmit students who had been suspended for wearing black arm bands in protest of the war in Vietnam.

This so-called symbolic speech, such as wearing an armband or burning a draft card or a flag to express an opinion, has sparked heated debate. In *Texas v. Johnson* (1989), the Court, by a narrow five to four vote, invalidated a law under which a man who burned an American flag to protest Reagan administration policies had been convicted. The decision so outraged some people that members of Congress considered amending the Constitution to prohibit any "physical desecration" of the flag. The amendment did not pass. Our freedoms of expression continue to depend upon the words in the first article of the Bill of Rights, written more than 200 years ago.



◀ In 1965 Mary Beth Tinker and her brother, John, were suspended from school for wearing armbands that symbolically criticized the Vietnam War.

THINKING CRITICALLY

CONNECT TO HISTORY

- Analyzing Primary Sources** Read Justice Holmes's dissent in *Abrams v. United States*. Compare it with the opinion he wrote in *Schenck v. United States*. Explain the major difference or similarity in the two opinions.



SEE SKILLBUILDER HANDBOOK, PAGE R22.

CONNECT TO TODAY

- INTERNET ACTIVITY** CLASSZONE.COM

Visit the links for Historic Decisions of the Supreme Court to research articles about free speech issues. Select several of these issues—such as whether hate groups have a right to march—to discuss with other students in your class. Choose one issue and, as a group, write down as many arguments as you can on both sides of the issue. Then present a debate to the class.